



6714-01-P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 390

RIN 3064-AE17

Transferred OTS Regulations Regarding Possession by Conservators and Receivers for Federal and State Savings Associations.

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) proposes to rescind and remove regulations regarding possession by conservators and receivers for federal and state savings associations, which are no longer necessary in light of or contradict provisions of the Federal Deposit Insurance Act and are not in accordance with FDIC practice and procedures. The regulations were included in the regulations that were transferred to the FDIC from the Office of Thrift Supervision (OTS) on July 21, 2011, in connection with the implementation of applicable provisions of Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Rescinding these regulations will eliminate confusion that may arise from duplicative or inconsistent rules and procedures and will eliminate unnecessary regulations.

DATES: Comments must be received on or before [insert date 60 days after publication in the Federal Register].

ADDRESSES: You may submit comments by any of the following methods:

- **FDIC Web Site:** <http://www.fdic.gov/regulations/laws/federal/>. Follow instructions for submitting comments on the agency website.

- **FDIC E-mail:** *Comments@fdic.gov*. Include RIN 3064-AE17 in the subject line of the message.
- **FDIC Mail:** Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429.
- **Hand Delivery to FDIC:** Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Please note: All comments received will be posted generally without change to <http://www.fdic.gov/regulations/laws/federal/>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT:

R. Penfield Starke, Assistant General Counsel, Legal Division (703) 562-2422 or rstarke@fdic.gov; Thomas Bolt, Senior Counsel, Legal Division (703) 562-2046 or tbolt@fdic.gov; or Manuel E. Cabeza, Counsel, Legal Division (703) 562-2434 or mcabeza@fdic.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Dodd-Frank Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”)¹, signed into law on July 21, 2010, provided for a substantial reorganization of the regulation of State and Federal savings associations and their holding companies. Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act,² the powers, duties, and functions formerly performed by the OTS were divided among the FDIC

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 12 U.S.C. 5301 *et seq.* (2010).

² 12 U.S.C. 5411

as to State savings associations, the Office of Comptroller of the Currency (OCC) as to Federal savings associations, and the Board of Governors of the Federal Reserve System (FRB) as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act³ provides the manner of treatment for all orders, resolutions, determinations, regulations, and other advisory materials, that were issued, made, prescribed, or allowed to become effective by the OTS. The section provides that if such advisory materials were in effect on the day before the transfer date, they continue in effect and are enforceable by or against the appropriate successor agency until they are modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

Section 316(c) of the Dodd-Frank Act⁴ further directed the FDIC and the OCC to consult with one another and to publish a list of the continued OTS regulations that would be enforced by the FDIC and the OCC respectively. On June 14, 2011 the FDIC's Board of Directors approved a "List of OTS Regulations to be Enforced by the OCC and the FDIC Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act." This list was published by the FDIC and the OCC as a Joint Notice in the Federal Register on July 6, 2011.⁵

FDIC's Authority to Regulate

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act⁶ granted the OCC rulemaking authority relating to both State and Federal savings associations, nothing in the Dodd-Frank Act affected the FDIC's existing authority to issue regulations under the Federal

³ 12 U.S.C. 5414(b)

⁴ 12 U.S.C. 5414(c)

⁵ 76 FR 39247 (July 6, 2011).

⁶ 12 U.S.C. 5412(b)(2)(B)(i)(II)

Deposit Insurance Act (the “FDI Act”)⁷ and other laws as the “appropriate Federal banking agency” or under similar statutory terminology. Section 312(c) of the Dodd-Frank Act amended section 3(q) of the FDI Act⁸ and designated the FDIC as the “appropriate Federal banking agency” for State savings associations. As a result, when the FDIC acts as the designated “appropriate Federal banking agency” (or under similar terminology) for State savings associations, as it does here, the FDIC is authorized to issue, modify and rescind regulations involving such associations.

As noted, on June 14, 2011 the FDIC’s Board of Directors reissued and redesignated certain transferring regulations of the former OTS. These transferred OTS regulations were published as FDIC interim rules in the Federal Register on August 5, 2011.⁹ When it republished the transferred OTS regulations as new FDIC regulations, the FDIC specifically noted that its staff would evaluate the transferred OTS rules and might later recommend incorporating the transferred OTS regulations into other FDIC rules, amending them, or rescinding them, as appropriate.

One of the regulations transferred to the FDIC governed the procedures to be followed by conservators and receivers for Federal and State savings associations upon taking possession of said entities and for the giving notice of their appointment. This OTS regulation, formerly found at 12 CFR part 558, was transferred to the FDIC with only nominal changes and is now found in the FDIC’s regulations at 12 CFR part 390, subpart N. Unlike the OTS, which was established in 1989 as an office within the Department of the

⁷ 12 U.S.C. 1811 *et seq.*

⁸ 12 U.S.C. 1813(q)

⁹ 76 FR 47652 (August 5, 2011).

Treasury,¹⁰ the FDIC's role and responsibilities when serving as conservator or receiver are defined by specific statutory provisions contained in the FDI Act. The FDIC is a federal corporation established by the FDI Act,¹¹ and has been entrusted with virtually complete responsibility for resolving failed insured depository institutions. The FDI Act confers expansive powers on the FDIC and its Board of Directors to ensure the efficiency of the process. The FDIC's Board of Directors is empowered to prescribe bylaws regulating the manner in which the FDIC's general business may be conducted and to exercise, directly or through duly authorized officers and agents, all powers specifically granted by the statute and such incidental powers as are necessary to carry out the powers so granted.¹² Pursuant to this authority, the FDIC's Board of Directors has appointed various officers and has issued resolutions delegating corporate authority to these officers. Pursuant to this delegated corporate authority, FDIC officers have established detailed procedures governing the closing of failed institutions when the FDIC is appointed conservator or receiver. If the proposed rule is adopted, the procedures followed by the FDIC upon appointment as conservator or receiver, implemented through delegated corporate powers, including those for providing notice of such appointment, will continue to be those followed by FDIC prior to the transfer of responsibilities from the former OTS. With respect to instances where the FDIC, pursuant to the discretion it has been granted under the FDI Act,¹³ elects to decline tendered appointment as conservator or receiver by an authority having supervision of an insured State depository institution, applicable State law will continue to govern matters pertinent to such conservatorships or receiverships.

¹⁰ The Office of Thrift Supervision was established by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified at various sections of 12 and 15 U.S.C.).

¹¹ 12 U.S.C. 1811(a)

¹² 12 U.S.C. 1819(a) "Sixth" and "Seventh."

¹³ 12 U.S.C 1821(c)(3)(A).

II. The Proposal

After careful review of 12 CFR part 390, subpart N—Possession by Conservators and Receivers for Federal and State Savings Associations, the FDIC proposes to rescind 12 CFR part 390, subpart N, because the regulations contained in this subpart are unnecessary in light of, or contrary to provisions of the FDI Act and are duplicative of, or not in accordance with FDIC practice and procedures. Regarding the functions of the former OTS that were transferred to the FDIC, section 316(b)(3) of the Dodd-Frank Act,¹⁴ in pertinent part, provides that the former OTS’s regulations will be enforceable by the FDIC until they are modified, terminated, set aside, or superseded in accordance with applicable law. After reviewing the rules regarding possession by conservators and receivers for Federal and State savings associations and notice procedures following such appointments, currently found in 12 CFR part 390, subpart N, the FDIC, as the appropriate Federal banking agency for State savings associations proposes to rescind these regulations in their entirety. The FDIC believes that the provisions of the FDI Act are sufficient to establish the authority of the FDIC, once it has been appointed conservator or receiver of an insured depository institution, to give adequate notice of its appointment and to take possession of and exercise control over the assets of a failed institution, including insured State savings associations. The rules found at 12 CFR part 390, subpart N¹⁵ are in some respects duplicative and in others inconsistent with the provisions of the FDI Act and current FDIC procedures established pursuant to the exercise of corporate powers granted FDIC under the FDI Act.

12 CFR §390.240 - Procedure upon taking possession.

¹⁴ 12 U.S.C. 5414(c)

¹⁵ 12 CFR Part 390, Subpart N contains two regulations: section 390.240, entitled “Procedure upon taking possession” and section 390.241 entitled “Notice of appointment.”

The FDIC interim rule found at 12 CFR 390.240 contains a transferred OTS regulation outlining procedures to be followed by conservators and receivers for Federal and State savings associations for taking possession of said entities upon appointment that is inconsistent with provisions of the FDI Act in two respects. First, the FDIC interim rule's references to "Executive Secretary"¹⁶ and "FDIC"¹⁷ suggest that only the FDIC will serve as conservator or receiver of an insured State depository institution, whereas a State authority could appoint a different entity as conservator or receiver, and the FDI Act provides that the acceptance of such tendered appointment is at the discretion of the FDIC rather than mandatory.¹⁸ In addition, the interim rule provides that the FDIC, upon being appointed conservator or receiver of a State or Federal savings association, is to take possession of the failed institution "*in accordance with the terms of the OCC's or State bank supervisor's, as appropriate, appointment*"¹⁹ and elsewhere requires the FDIC to post a notice at all locations where the failed institution operated, as "*prescribed by the OCC or State bank supervisor, as appropriate.*"²⁰ These two provisions diverge from the FDI Act, which provides that, when acting as conservator or receiver, the FDIC "*shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the Corporation's rights, powers, and privileges.*"²¹

This transferred OTS regulation is inconsistent with FDIC practice and procedures in two respects. Section 390.240(a) requires the FDIC, when appointed as receiver or

¹⁶ 12 CFR 390.240(b)(3).

¹⁷ 12 CFR 390.241

¹⁸ 12 U.S.C. 1821(c)(3)(A) provides that "[w]henver the authority having supervision of any insured State depository institution appoints a conservator or receiver for such institution and tenders appointment to the Corporation, the Corporation **may** accept such appointment." [Emphasis added].

¹⁹ 12 CFR 390.240(a).

²⁰ §390.240(b)(4)

²¹ 12 U.S.C. 1821(c)(2)(C) [with respect to Federal depository institutions] and 12 U.S.C. 1821(c)(3)(C) [with respect to insured State depository institutions].

conservator to take “*possession of the principal office*” of the failed institution, whereas, in practice, the FDIC, upon appointment as conservator or receiver, takes coordinated simultaneous possession of all locations from which a failed institution operates, even in cases where multiple time zones are involved. In addition, §390.240(b)(3) requires the filing of a statement with the Executive Secretary indicating that the conservator or receiver took possession of the failed institution. This provision is also inconsistent with FDIC practice. The FDIC Board of Directors is aware of all impending potential appointments of the Corporation as conservator or receiver of a failing insured depository institution and, at the appropriate time, adopts resolutions specific to the failing institution delegating to corporate officers the necessary authority to accept the appointment and carry out the required procedures to take possession of a failed institution. Accordingly, it is not necessary for corporate officers to whom authority has been thus delegated, to file any statement or otherwise give specific notice to the Executive Secretary or the Board of Directors about taking actions the Board of Directors specifically directed them to take. The electronic notifications, press releases and website postings handled by the FDIC’s Office of Communications upon the closing of a failed institution serve to keep all interested parties, public and internal, adequately informed.

Finally, this transferred OTS regulation is duplicative of self-executing provisions of the FDI Act. Section 390.240(b) contains provisions that prescribe actions that the FDIC must take after taking possession of a savings association. These include: (1) taking possession of the failed institutions books, records and assets;²² (2) providing written notice to certain parties, “personally or by registered mail or telegraph,” that the FDIC “has

²² §390.240(b)(1)

succeeded to rights, powers and privileges of the [failed institution];”²³ and (3) a statement of the fact that FDIC as conservator or receiver succeeds to the rights, titles, powers and privileges of the failed institution and its assets.²⁴ These provisions are redundant and unnecessary.²⁵ Pursuant to the FDI Act, FDIC, as conservator or receiver, by operation of law, succeeds to “all rights, titles, powers and privileges of the [failed] institution . . . and the assets of the [failed] institution.”²⁶ The FDI Act also empowers the FDIC, as conservator or receiver, “to take over the assets and operate the insured depository institution with all the powers of the members or shareholders, the directors and the officers of the institution and conduct all business of the institution.”²⁷ These provisions of the FDI Act are self-executing and do not require a regulation to restate, add or subtract from their broad clear and unambiguous language.

12 CFR 390.241 – Notice of Appointment.

The FDIC interim rule found at 12 CFR 390.241 contains a transferred OTS regulation outlining procedures for giving notice of the appointment of a conservator or receiver for a Federal or State savings association that is contrary to provisions of the FDI Act or is inconsistent with FDIC practice and procedures in several respects. First, §390.241(a) requires the FDIC, when the OCC or a State bank supervisor appoints it as conservator or receiver, to designate the person or entities that will give or post certain notices and certified copies of documents prior to taking possession of the failed institution. The FDIC’s Board of Directors, pursuant to authority in the FDI Act has delegated authority to certain corporate positions, among them those of Closing Manager and Receiver-in-

²³ §390.240(b)(2)

²⁴ §390.240(b)(5)

²⁵ FDIC provides notice to interested parties through press releases and its website.

²⁶ 12 U.S.C. 1821(d)(2)(A)

²⁷ 12 U.S.C. 1821(d)(2)(B)

Charge. The officers appointed to fill these positions have the necessary authority to take the actions contemplated in §390.241(a). This authority is delegated from the FDIC's Board of Directors by means of resolutions that are a matter of public record and are readily available.

Second, §390.241(a)(1) through (3) preconditions the conservator's or receiver's taking possession of a failed savings association on certain notice requirements providing that *"before the conservator or receiver takes possession of the savings association"* the FDIC must give notice *"to any officer or employee who is present in and appears to be in charge at the principal office of the savings association;"*²⁸ must serve a copy of the order for the appointment by *"leaving a certified copy of the order of appointment at the principal office of the savings association,"*²⁹ or by *"handing a certified copy of the order of appointment to the previous conservator . . . or the officer or employee of the savings association . . . who is present in and appears to be in charge at the principal office of the savings association,"*³⁰ and must file *"with the Executive Secretary of the FDIC a statement that includes the date and time that notice of the appointment was given and service of the order of appointment was made."*³¹ Pursuant to the FDI Act, when appointed conservator or receiver, the FDIC, by operation of law, succeeds to the assets and all rights, titles, powers and privileges of a failed institution. The FDI Act also empowers the FDIC, as conservator or receiver, to take over the assets and operate the failed insured depository institution.³² As stated above, these provisions of the FDI Act are self-executing and the taking of possession of a failed savings association by the FDIC following its appointment as conservator or receiver is not conditioned on the giving of notice of appointment or the serving of an order

²⁸ 12 CFR 390.241(a)(1)

²⁹ 12 CFR 390.241(a)(2)(i)

³⁰ 12 CFR 390.241(a)(2)(ii)

³¹ 12 CFR 390.241(a)(3)

³² See Footnotes 19 and 20 and related text.

of appointment. In addition, the notices listed in §390.241(a)(1) through (3) are given instantaneously and simultaneously through electronic means by the FDIC upon acceptance of the appointment. The requirements in this rule are cumbersome, redundant and inconsistent with the FDI Act.

Rescinding the rules found at 12 CFR part 390, subpart N will serve to streamline the FDIC's rules, prevent confusion and eliminate unnecessary regulations.

III. Request for Comments

The FDIC invites comments on all aspects of the proposed rulemaking. Written comments must be received by the FDIC no later than [insert date 60 days after publication in the Federal Register].

IV. Regulatory Analysis and Procedure

A. The Paperwork Reduction Act

Removing part 390, subpart N will not revise any existing information collections pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Consequently, FDIC has not submitted any information collection revisions to the Office of Management and Budget for review.

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, (RFA), requires that each Federal agency either (1) certify that a proposed rule would not, if adopted in final form, have a significant economic impact on a substantial number of small entities or (2) prepare an initial regulatory flexibility analysis of the rule and publish the analysis for comment.

Rescinding 12 CFR part 390, subpart N will leave the FDI Act as the sole source of the FDIC's authority to act as conservator or receiver for an insured depository institution and does not impose any obligations or restrictions on banking organizations, including small banking organizations. On this basis, the FDIC certifies that this proposal, if it is adopted in final form, would not have a significant impact on a substantial number of small entities, within the meaning of those terms as used in the RFA.

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Pub. L. 106-102, 113 Stat. 1338, 1471, 12 U.S.C. 4809, requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. As a Federal banking agency subject to the provisions of this section, the FDIC has sought to present the proposed rule to rescind Part 390, Subpart N in a simple and straightforward manner. The FDIC invites comments on whether the proposal is clearly stated and effectively organized, and how the FDIC might make the proposal easier to understand.

D. The Economic Growth and Regulatory Paperwork Reduction Act.

Under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 ("EGRPRA"), the FDIC is required to review all of its regulations, at least once every 10 years, in order to identify any outdated or otherwise unnecessary regulations imposed on insured institutions. The FDIC completed the last comprehensive review of its regulations under EGRPRA in 2006 and is commencing the next decennial review. The action taken on this rule will be included as part of the EGRPRA review that is currently

under way. As part of that review, the FDIC invites comments concerning whether the Proposed Rule would impose any outdated or unnecessary regulatory requirements on insured depository institutions. If you provide such comments, please be specific and provide alternatives whenever appropriate.

List of Subjects in 12 CFR Part 390

Banks and banking, Savings associations

Authority and Issuance

For the reasons stated in the preamble and under the authority of 12 U.S.C. 5412, the Board of Directors of the Federal Deposit Insurance Corporation proposes to amend 12 CFR part 390 as follows:

PART 390 -- REGULATIONS TRANSFERRED FROM THE OFFICE OF THRIFT SUPERVISION

1. The authority citation for part 390 is revised to read as follows:

Authority: [12 U.S.C. 1819](#).

Subpart A also issued under [12 U.S.C. 1820](#).

Subpart B also issued under [12 U.S.C. 1818](#).

Subpart C also issued under [5 U.S.C. 504](#); 554-557; [12 U.S.C. 1464](#); 1467; 1468; 1817; 1818; 1820; 1829; 3349, 4717; [15 U.S.C. 78 l](#); 78o-5; 78u-2; [28 U.S.C. 2461](#) note; [31 U.S.C. 5321](#); [42 U.S.C. 4012a](#).

Subpart D also issued under [12 U.S.C. 1817](#); 1818; 1820; [15 U.S.C. 78 l](#).

Subpart E also issued under [12 U.S.C. 1813](#); 1831m; [15 U.S.C. 78](#).

Subpart F also issued under [5 U.S.C. 552](#); 559; [12 U.S.C. 2901](#) *et seq.*

Subpart G also issued under [12 U.S.C. 2810](#) *et seq.*, 2901 *et seq.*; [15 U.S.C. 1691](#); [42 U.S.C. 1981](#), 1982, 3601-3619.

Subpart H also issued under [12 U.S.C. 1464](#); 1831y.

Subpart I also issued under [12 U.S.C. 1831](#)x.

Subpart J also issued under [12 U.S.C. 1831](#)p-1.

Subpart L also issued under [12 U.S.C. 1831](#)p-1.

Subpart M also issued under [12 U.S.C. 1818](#).

Subpart O also issued under [12 U.S.C. 1828](#).

Subpart P also issued under [12 U.S.C. 1470](#); 1831e; 1831n; 1831p-1; 3339.

Subpart Q also issued under [12 U.S.C. 1462](#); 1462a; 1463; 1464.

Subpart R also issued under [12 U.S.C. 1463](#); 1464; 1831m; 1831n; 1831p-1.

Subpart S also issued under [12 U.S.C. 1462](#); 1462a; 1463; 1464; 1468a; 1817; 1820; 1828; 1831e; 1831o; 1831p-1; 1881-1884; 3207; 3339; [15 U.S.C. 78b](#); 78 *l*; 78m; 78n; 78p; 78q; 78w; [31 U.S.C. 5318](#); [42 U.S.C. 4106](#).

Subpart T also issued under [12 U.S.C. 1462a](#); 1463; 1464; [15 U.S.C. 78c](#); 78 *l*; 78m; 78n; 78w.

Subpart U also issued under [12 U.S.C. 1462a](#); 1463; 1464; [15 U.S.C. 78c](#); 78 *l*; 78m; 78n; 78p; 78w; 78d-1; 7241; 7242; 7243; 7244; 7261; 7264; 7265.

Subpart V also issued under [12 U.S.C. 3201](#)-3208.

Subpart W also issued under [12 U.S.C. 1462a](#); 1463; 1464; [15 U.S.C. 78c](#); 78 *l*; 78m; 78n; 78p; 78w.

Subpart X also issued under [12 U.S.C. 1462](#); 1462a; 1463; 1464; 1828; 3331 *et seq.*

Subpart Y also issued under 12 U.S.C.1831o.

Subpart Z also issued under [12 U.S.C. 1462](#); 1462a; 1463; 1464; 1828 (note).

Subpart N – [Removed and Reserved]

2. Remove and reserve subpart N, consisting of §§ 390.240 through 390.241.

Dated at Washington, D.C., this 15th day of July, 2014.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman
Executive Secretary

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